

Title IX Training

Emily S. Pontius

May 13, 2024

Fredrikson

Where Law and Business Meet[®]

Background

Title IX of the Education Amendments Act of 1972:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, including admissions and employment.

Background

- The U.S. Department of Education's current regulations implementing Title IX were published in the Federal Register on May 19, 2020, and became effective August 14, 2020. <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf>
- On April 19, 2024, the DOE released the new regulations that will become effective August 1, 2024. <https://www2.ed.gov/about/offices/list/ocr/docs/t9-unofficial-final-rule-2024.pdf>

Terms to Know

- Complaint:
 - *Until 8/1:* There must be a Formal Complaint initiated by the Complainant or the Title IX Coordinator.
 - *Effective 8/1:* An oral or written request that objectively can be understood as a request for an investigation/determination.
- Complainant: Any individual who is alleged to [*Until 8/1) be the victim of sexual harassment/(Effective 8/1)have been subjected to conduct that could constitute sex discrimination*].
- Respondent: Any individual who is [*reported to be the perpetrator of sexual harassment/alleged to have violated the prohibition on sex discrimination or harassment*].

Terms to Know

- **Confidential Employee:** An employee of a recipient whom the recipient has designated as confidential for the purpose of providing services to persons related to sex discrimination. If the employee also has a duty not associated with providing those services, the employee's confidential status is only with respect to information received about sex discrimination in connection with providing those services.

Sexual Harassment Defined

Conduct based on sex that satisfies one or more of the following:

- 1) An employee conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct or
- 2) Unwelcome sex-based conduct
 - *Until 8/1*: determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the University's Education Program or Activity
 - *Effective 8/1*: that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe **or** pervasive that it **limits** or denies a person's **ability to participate in or benefit from** the University's Education Program or Activity.

Sexual Harassment Defined

Effective 8/1, the regulations:

- Clarify that sex discrimination/sex harassment includes discrimination/harassment based on sex stereotypes, sex characteristics, pregnancy and related conditions, sexual orientation, and gender identity.

Sexual Harassment Defined

Sexual Assault: Any nonconsensual sexual act or any sexual act with a Complainant lacking capacity to consent including, without limitation:

- Rape, sexual battery, sexual abuse, fondling, incest, statutory rape, and sexual coercion;
- Any intentional sexual touching, however slight, with any object, by a person upon another person that is without consent and/or by force;

Sexual Harassment Defined

Sexual Assault (continued):

- Intentional contact with the breasts, buttock, groin, or genitals, or touching another with any of these body parts, or making another touch a person or themselves with or on any of these body parts;
- Any sexual intercourse, however slight, with any object, by a person upon another person that is without consent and/or by force. Intercourse includes vaginal or anal penetration by a penis, object, tongue or finger, and oral copulation (mouth to genital contact), no matter how slight the penetration or contact.

Sexual Harassment Defined

Dating Violence: Violence committed by a person—

- A. Who is or has been in a social relationship of a romantic or intimate nature with the Complainant; and
- B. Where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - i. The length of the relationship.
 - ii. The type of relationship.
 - iii. The frequency of interaction between the persons involved in the relationship.

Sexual Harassment Defined

Domestic Violence: Violence committed by a current or former spouse or intimate partner of the Complainant, by a person with whom the Complainant shares a child in common, by a person who is cohabiting with or has cohabited with the Complainant as a spouse or intimate partner, by a person similarly situated to a spouse of the Complainant, or by any other person against a Complainant who is protected from that person's acts under Iowa law.

Sexual Harassment Defined

Stalking: When a person engages in a course of conduct or repeatedly commits acts toward another person, including following the person without proper authority, under circumstances that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.

Retaliation is Prohibited by Title IX

Retaliation: Intimidating, threatening, coercive, or discriminatory conduct directed to an individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding or hearing.

Jurisdictional Criteria for Title IX Application

Until 8/1:

1. The conduct must have occurred against a person in the United States;
2. The conduct must have occurred within an Education Program or Activity of the University; and
3. The Complainant must be participating in or attempting to participate in an Education Program or Activity of the University at the time the complaint is submitted.

Jurisdictional Criteria for Title IX Application

Effective 8/1:

~~1. The conduct must have occurred against a person in the United States;~~

UIU will be obligated to address conduct even when some of the conduct took place outside the U.S.

~~1. The conduct must have occurred within an Education Program or Activity of the University; and~~

UIU will be obligated to address conduct even when some of the conduct took place outside the Education Program or Activity.

1. The Complainant must be participating in or attempting to participate in an Education Program or Activity of the University at the time the complaint is submitted.

Jurisdictional Criteria

Consequences

Effective 8/1: Title IX will apply to conduct at an overseas conference, study abroad program, or international exchange program.

Jurisdictional Criteria

Consequences

Effective 8/1: Title IX will apply even when some of the conduct occurred outside the University-operated program or activity.

Jurisdictional Criteria

Consequences

Effective 8/1: Title IX *may apply* even if the Complainant is not a student, employee, or applicant for employment or admission *so long as the Complainant is participating or attempting to participate in the Education Program or Activity.*

Terms to Know

Education Program or Activity:

Until 8/1: All programs and activities operated by UIU, including locations, events, or circumstances over which UIU exercises substantial control over both the Respondent and the context in which the alleged conduct occurs, including buildings owned or controlled by student organizations officially recognized by UIU.

Effective 8/1: All the operations of UIU.

Reporting Sexual Misconduct

Until 8/1:

- Confidential Resources cannot report to the Title IX Coordinator or anyone else
- Non-Confidential Resources are encouraged to report to the Title IX Coordinator
- Responsible Employees must report to the Title IX Coordinator

Effective 8/1:

- Confidential *Employees* cannot report to the Title IX Coordinator or anyone else
- Any non-confidential employee with authority to take corrective action or responsibility for the University's education program or activity **MUST** notify the Title IX Coordinator
- All non-confidential employees must notify the Title IX Coordinator or provide information to the individual with information

Terms to Know

Until 8/1:

Actual Knowledge: Notice of sexual harassment or allegations of sexual harassment to the University's Title IX Coordinator or to any official who has authority to institute corrective measures on behalf of the University ("Responsible Employee").

Effective 8/1:

All non-confidential employees have an obligation to either:

- (1) Notify the Title IX Coordinator, or
- (2) Provide the contact information for the Title IX Coordinator and information about how to make a complaint.

Terms to Know (*Until 8/1*)

Responsible Employee: University officials who have the authority to institute corrective measures on behalf of the University. A Responsible Employee's knowledge of sexual harassment or allegations of sexual harassment constitutes Actual Knowledge by the University.

Responsible Employees (*Until 8/1*)

- The University has Actual Knowledge of potential allegations of Sexual Harassment if a Responsible Employee/Official with Authority is aware of those potential allegations.
- When the University has Actual Knowledge, it is required to respond in accordance with Title IX.

Pre-Investigation Activity (*Until 8/1*)

- Title IX Coordinator learns of alleged misconduct and meets with Complainant
- Complainant or Title IX Coordinator initiates Formal Complaint
- Title IX Coordinator sends parties notice of the allegations and appoints investigator(s) free of conflict or bias

Pre-Investigation Activity (*Effective 8/1*)

- Title IX Coordinator learns of alleged misconduct and meets with Complainant
- Title IX Coordinator determines whether there is an oral or written request that objectively can be understood as a request for an investigation/determination
- Title IX Coordinator sends parties notice of the allegations and determines next steps

Terms to Know

Advisor: A person selected to provide advice to a party for all, or a portion, of the grievance process. Complainants or Respondents may be accompanied by one Advisor, who is not a witness, to any Title IX related proceeding. Advisors are not mandatory, except that only an Advisor may cross-examine other parties and witnesses during a live hearing. If a party does not have an Advisor for cross-examination, UIU will provide one for the purpose of conducting cross-examination during a live hearing. Cross-examination is the only time an Advisor may speak for a party or directly address another party.

Terms to Know

Supportive Measures: Services offered to a Complainant or Respondent to restore or preserve equal access to UIU's Education Programs and Activities, protect the safety of any party or the UIU community, or deter sexual harassment. Supportive Measures are non-disciplinary, non-punitive, and confidential to the extent possible. Supportive Measures may be offered even if a Complainant does not submit a Formal Complaint.

The Informal Resolution Process

- Alternative path to resolution in some situations.
- Initiated any time after a Formal Complaint is filed.
- No investigation, hearing, determination of responsibility or appeal.
- Both parties must agree in writing.
- Facilitated by an individual trained in mediation or other comparable training.
- Any party or UIU may choose to resume the formal process at any time before agreement.

How to Conduct Investigations

Step 1. Review the Formal Complaint, §106.45(b)(5) of the new regulations, and the Investigation Process section of the Title IX Policy on page 8.

- Responsibility for gathering evidence.
- Discretion to investigate allegations with consideration of unique circumstances.
- Equal treatment of the parties.
- Notice requirements.

How to Conduct Investigations

Step 2. Interview Complainant and Respondent.

- Provide written notice of date, time, location, and purpose 5 days before the interview.
- Prepare questions to gather key information.
 - Witnesses, Consent, Incapacitation, Documents
 - What happened then? Do you remember anything else about _____? Can you provide more information about that? I'm not sure I am clear on _____?
 - Do you need to take a break?
 - Will you please contact me if you think of additional witnesses or evidence?

How to Conduct Investigations

Step 3. Prepare an investigation plan and timeline that allows you to provide a preliminary investigative report within 10 business days after interviewing the parties. Include:

- Witness interviews
- Evidence to be collected from parties and witnesses
- Build in time to conduct additional interviews and gather evidence after you begin writing
- If the investigation plan changes, document the change and the reason for the change

How to Conduct Investigations

Step 4. Prepare the preliminary investigative report and simultaneously provide the report and all evidence to the parties and their advisors for their inspection, review, and written response.

- Parties have ten days to provide their written responses.
- If written responses are received, the Investigator(s) must carefully consider the responses and follow up with additional interviews and evidence-gathering if necessary before preparing the final report.

Investigative Reports

- Evidence about the Complainant's sexual predisposition or prior sexual behavior is not relevant and should not be included.
- Unless:
 - Such evidence is included as evidence that someone other than the Respondent is responsible for the alleged conduct
 - Such evidence concerns specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and is included as evidence of Consent

Investigative Reports

- The report must fairly summarize all relevant evidence.
- Both inculpatory and exculpatory.
 - No discretion to include only evidence that indicates the Respondent is responsible for the conduct, nor does the investigator have discretion to include only evidence that tends to show the Respondent is not responsible for the conduct.
- The report must describe all procedural steps taken in the investigation.

Pre-Hearing Activity

- The final investigative report and all evidence is provided to the Title IX Coordinator, the parties, and the parties' advisors.
- The Title IX Coordinator designates one or more individuals free of conflicts of interest and bias to serve as decisionmakers.
- The Title IX Coordinator consults with the parties, advisors, and decisionmakers and determines the hearing date.
- The Title IX Coordinator provides written notice of the hearing date no less than 10 days prior to the hearing.

Technology for Live Hearings

- Title IX hearings must be live, recorded, and may be held in-person or remotely using videoconferencing that allows the parties to simultaneously see and hear the party or the witness answering questions.
- The decisionmaker(s) must promptly consult with the Title IX Coordinator and the University's technology personnel to determine the appropriate and available videoconferencing technology.
- Decisionmaker(s) are responsible for learning or arranging training to enable recording and operation of the videoconferencing platform.

Relevancy of Questions and Evidence at Live Hearings

- Evidence about the Complainant's sexual predisposition or prior sexual behavior is not relevant and should not be admissible at the hearing.
- Unless:
 - Such evidence is admitted as evidence that someone other than the Respondent is responsible for the alleged conduct
 - Such evidence concerns specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and is admitted as evidence of Consent

Pre-Hearing Meeting

Decisionmakers have discretion to require a pre-hearing meeting with the parties and their advisors to cover:

- Role of Advisors
- Order of Hearing
- Hearing Rules
- Standards for relevancy and admissibility
- Other matters of concern

The Hearing Process

- Decisionmakers have discretion to determine the order of the hearing provided the parties are treated equally.
- Considerations include:
 - Availability of witnesses
 - Type of evidence to be presented
 - Needs of the parties

The Hearing Process

Suggested Hearing Order:

1. Introductions and Order of Hearing
2. Investigator presents the final investigative report and answers questions posed by the Decisionmaker(s) and Advisors.
3. Individuals present statements and answer questions posed by Decisionmaker(s) and Advisors in this order: Complainant, Complainant's witnesses, Respondent, Respondent's witnesses.

Terms to Know

Preponderance of the Evidence: The standard used by UIU to determine if a policy violation occurred. Preponderance of the evidence means that the information/evidence demonstrates that it is more likely than not that the alleged conduct or policy violation has occurred.

The Hearing Process

- Following presentations and questioning, the Decisionmaker(s) will dismiss the parties and deliberate.
- The Decisionmaker(s) are to use Preponderance of the Evidence as the standard of proof to determine responsibility.
- The Decisionmaker must provide the Title IX Coordinator a written decision and recommended Sanctions and Remedies, if any.

Terms to Know

Sanctions: Disciplinary action imposed upon a Respondent after a determination of responsibility following a grievance process that complies with this policy and Title IX.

Remedies: Measures to restore or preserve the Complainant's equal access to UIU's Education Programs and Activities.

The Appeal Process

- Any party may appeal a finding regarding responsibility or a decision to dismiss allegations from the Title IX process.
- Permissible bases for appeal:
 - Procedural irregularity that affected the outcome of the matter;
 - New evidence that was not reasonably available that could affect the outcome of the matter; and
 - Evidence of conflict of interest or bias that affected the outcome of the matter.

Serving Impartially

- Avoid prejudgment based on past conduct, appearance, academic or job performance.
- Be aware of factors that create an appearance of bias or conflict of interest.
- Take seriously the admonishments to treat all parties equitably and consider the timing, setting, and tone of all meetings, interviews, and pre-hearing activities.
- Treat Advisors of Complainants and Respondents equally.

Dismissal of Formal Complaints

- At Complainant's Request
- If Respondent is no longer a student or employee
- If circumstances prevent UIU from gathering sufficient evidence
- Dismissal is appealable

False Statements

- False statements by participants may lead to discipline under the Code of Student Conduct or discipline of employees.
- A determination regarding responsibility, alone, is not evidence of a false statement.

Recordkeeping

- Records related to Title IX proceedings must be retained for 7 years.
- Live hearings must be recorded or transcribed.
- Training materials must be posted on UIU's website.

Law Enforcement

- Differing standards for responsibility, prosecution, and conviction.
- Processes may run concurrently and have different results.
- Cooperation with law enforcement investigations.
- Assistance for Complainants who wish to report to law enforcement.

Thank you.



Emily S. Pontius

Office: 515.242.8914

Mobile: 515.664.8432

epontius@fredlaw.com